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Supreme Court of the United States

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,

and

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS' COMMITTEE OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,
Respondents.

BRIEF ON BEHALF OF R. C. PARSONS, RECEIVER, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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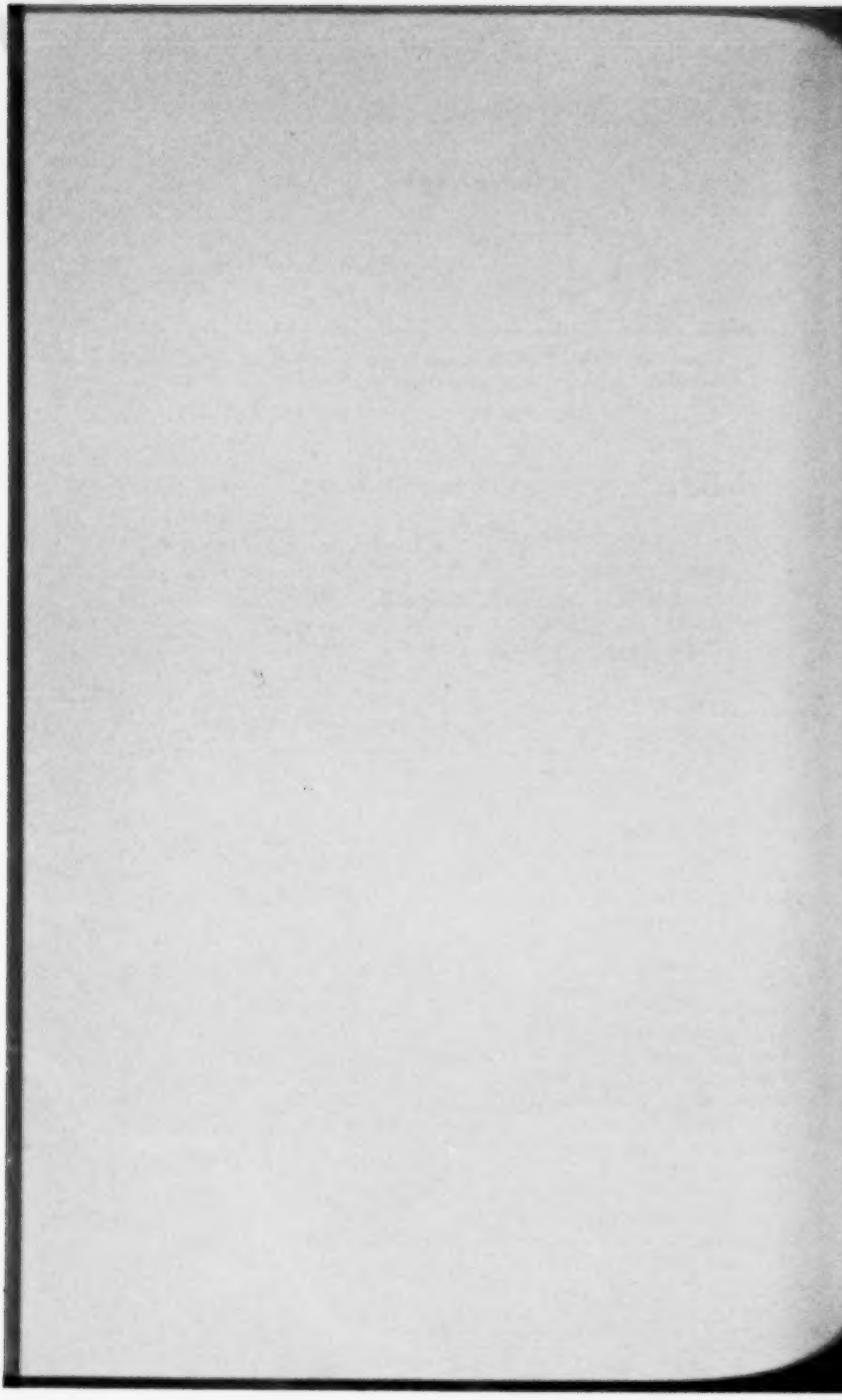

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STATEMENT OF THE CASE

This is a suit in equity for an accounting. The plaintiff is the Receiver, appointed by the Comptroller of the Currency, for Commercial National Bank of Shreveport, hereinafter referred to as the old bank. The defendant is the Commercial National Bank in Shreveport, hereinafter referred to as the new bank.

The facts are largely summarized in the opinions of the District Court (R. 50, 684) and the Court of Appeals

(R. 784, 822).[1] We believe it will aid the Court, however, to summarize here the more important facts.

The basis of the suit is a contract dated December 3, 1932, between the old bank and the new bank. The new bank was organized for the purpose of acquiring and taking over the old bank. Its organizers consisted of the old bank's officers and a number of its directors and stockholders, and the executive vice-president of the new bank (who had occupied a corresponding position in the old bank), drafted the contract (R. 474). The old bank had a capital of $1,000,000 and so did the new bank. Most of the new bank's capital was obtained from the old bank on the day it closed by a loan which the organizers of the new bank that day obtained from the old bank.[2]

The contract provided that the old bank should transfer all of its assets to the new bank in order that the latter might liquidate the same. The new bank assumed all of the obligations of the old bank. The contract provided that when the new bank should have collected from the old bank's assets

> "an amount sufficient to **indemnify**[3] itself for the liability herein and hereby assumed, including expenses and a reasonable fee as hereinabove provided",

the residue of the assets should be delivered to the Stockholders' Committee of the old bank or liquidated for its account (R. 19). Contracts resembling this one in some features are not uncommon, being designed to ac-

[1]The opinions of the District Court (R. 50, 684) are reported under the titles *Leslie v. Commercial National Bank*, 28 F. Supp. 927 (1939) and *Rawlings v. Commercial National Bank of Shreveport*, 44 F. Supp. 5 (1942). Leslie and Rawlings were, successively, receivers of the old bank prior to the appointment of the present receiver, R. C. Parsons.

The original opinion of the Court of Appeals (R. 784) is reported at 144 F. (2d) 231 (1944). The opinion on rehearing (R. 822) is not yet officially reported.

[2]The notes representing this loan were part of the assets turned over to the new bank for liquidation and were paid in due course.

[3]Black lettering throughout this brief is that of the authors of the brief unless otherwise indicated.

complish the orderly liquidation of the assets of a bank so as to avoid the necessity of the appointment of a receiver. But we have been unable to find in the reported cases any other case in which there was a contract containing the peculiar provisions of the present contract or in which the circumstances of liquidation corresponded to the circumstances of the present case.[4]

Apart from the tax item hereinafter referred to, the controversy here derives from the unique provision of the contract in this case, that the new bank should be entitled to interest at the rate of six per cent per annum on Class B assets of the old bank. The contract provided for the division of the assets of the old bank into three classes, A, B, and C. Class A was made up of cash and items (such as Government bonds) considered equivalent to cash. Class B was made up of other assets in an amount which when added to the Class A assets would equal the obligations of the old bank assumed by the new bank. Class C was made up of the remaining assets of the old bank. (R. 17-19).

The total obligations of the old bank assumed by the new bank, consisting chiefly of liabilities for deposits, amounted to $13,479,610.53 (R. 692). The total assets of the old bank had a face value of $15,473,678.41.[5] On book values, therefore, the old bank had an excess of assets over liabilities amounting to approximately two million dollars.

Although there was thus an apparent surplus of assets transferred over liabilities assumed, the contract provided that the old bank should execute and deliver to

[4] *Certiorari* does not ordinarily issue in a case which is peculiar upon its facts and may never arise again. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pages 534 and 536, and cases therein cited.

[5] R. 691 shows total assets of $16,473,678.41. This, however, includes the $1,000,000 note hereinafter referred to which was only a symbol and to represent which no moneys came into the hands of the old bank. Of the old bank's total assets of $15,473,678.41, cash and similar items amounted to $3,435,799.54.

the new bank a note of one million dollars as an additional guarantee to the new bank. The amount of this note corresponded to the amount of the capital of the old bank, for which under the then law an assessment against stockholders of the old bank might have been made. No money was advanced against this note; it was merely a symbol used to represent the maximum enforceable liability that the old bank would have been under if its assets had fallen short of its liabilities. As a matter of fact, the assets transferred proved more than sufficient to extinguish all obligations of the new bank, plus charges made by the new bank aggregating $1,311,346.64, and after paying all these sums to leave a substantial balance in the hands of the new bank.

The charges aggregating $1,311,346.64 were arrived at by computing interest at the rate of six per cent per annum on Class B assets in accordance with the provisions of Article V of the contract (R. 18-19). As a result of these provisions the new bank with a capital of only one million dollars (most of which was obtained from the old bank's assets, as above set out) began immediately to set up charges of six per cent per annum on Class B assets, which assets on the day the new bank started business amounted to approximately ten million dollars (R. 353). Thus the new bank built up charges during the life of the contract amounting to $1,311,346.64.[6]

Pursuant to the contract, the real estate of the old bank was transferred into the name of the new bank. The new bank returned the real estate for assessment for local taxes as if it were its property. Under Louisiana law the shares of stock in the new bank were subject

[6]The symbolic million dollar note was for a time included in Class B assets and for a time in Class A. (R. 351).

While the note was in Class A assets, the new bank charged 6% interest upon it as it would have done upon any other note, although it represented no real loan. While it was in Class B assets, it was part of the total on which the charge of 6% per annum was figured.

to local assessment, but in calculating the value of said shares for assessment purposes, a deduction could be taken for real estate assessed to the bank. The new bank thus used the real estate of the old bank to reduce the taxes on its stock and thereby saved $191,778.55. This saving increased the surplus and undivided profits of the new bank.

PROCEEDINGS IN THE LOWER COURTS

In its original petition the old bank sought a general accounting, complaining particularly of the excessive charges made by the new bank for so-called interest, exceeding $1,300,000, and the failure of the new bank to give credit for the taxes saved through use of the old bank's property (R. 1 to 12). By a supplemental and amended petition the old bank alleged that the charges made by the new bank were usurious (R. 45).

The new bank filed a motion to strike the allegations of the petition regarding the tax savings. This motion was denied by the District Judge with written reasons (R. 50), reported in 28 F. Supp. 927. Thereupon the new bank answered claiming a credit which gave effect to the charges of $1,311,346.64, above referred to, and also claiming additional credits aggregating $284,353.02 for services in administering Class C assets and for pro-rata of salaries in administration of Class B and Class C assets (R. 39, 66 ff.)

The case was tried on the merits in due course. The District Court rendered an opinion (R. 684), reported in 44 F. Supp. 5, holding that the old bank was entitled to the benefit of the tax savings which had been obtained by the use of its property. The Court rejected the claims of the defendant bank for additional compensation. It did not accord the old bank any relief

from the new bank's charges aggregating $1,311,346.64.[7] The District Court directed the defendant to file an account in accordance with the rulings made by the Court in its opinions shown at R. 50, 684.

An account was in due course filed by the defendant and a decree entered providing for the recovery by the plaintiff from the defendant of sums aggregating $509,-114.49, with interest from various dates (R. 762).

The new bank gave the following notice of appeal:

> "Notice is hereby given that the Commercial National Bank in Shreveport, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this section on April 13, 1943." (R. 765.)

This was an appeal from the entire judgment, not a part of it. No cross-appeal was filed. The appellant designated the entire record to be presented to the upper court (R. 782).

In its brief in the appellate court the appellant asked that the case "be remanded to the lower Court for a trial **on the merits** and adjudication as to the amount properly allowable to the defendant for administration of the Class C assets and for salaries provided for in the amended contract and **for final accounting.**"[8]

The Circuit Court of Appeals, one judge dissenting, held that the decree of the District Court should be reversed because the court had rejected the claim of the

[7]Counsel for the Receiver had stated to the District Court that while of the opinion that these charges were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. The District Court in its opinion described the contract as "harsh" and stated that the plaintiff had sought "the application of such equitable considerations as the circumstances demand", but did not accord any relief with respect to the charges of $1,311,346.64. (R. 694).

[8]See language of the appellant quoted in the opinion on rehearing of the Court of Appeals, R. 822.

defendant for an allowance for administration of Class C assets. The case was "remanded generally * * * for further proceedings not inconsistent with the opinion of this Court. * * *" (R. 812).

In its opinion, the Court of Appeals indicated its view that upon a new trial the old bank would be entitled in equity to relief from the charges aggregating $1,311,346.64. The Court of Appeals held that its **power** to review the entire case and to indicate the principles which should govern the District Court upon a new trial was not affected by the fact that the old bank had not taken a cross-appeal, the proceeding being one in equity and the case being remanded generally for trial on the merits upon a general appeal taken by the new bank. The defendant new bank now applies for *certiorari.*

Our opposition to the granting of *certiorari* proceeds upon the following grounds:

(1) *Certiorari* will not ordinarily issue to review an interlocutory order. There has been no final decision below.

(2) In an equity case which is reversed generally and remanded for a new trial at the request of the appellant, the absence of a cross-appeal did not deprive the appellate court of the power to indicate its views upon the law of the case to be applied upon the new trial.

(3) A court may, and indeed should, disregard admissions of counsel on questions of law where such admissions are deemed erroneous.

(4) The opinion of the Court of Appeals is not, on the special facts of this case, contrary to any local law, statute or decision.

(5) The opinion of the Court of Appeals is not contrary to the decision of any other Circuit Court of Appeals.

(6) There was no error in the decision upon the tax point; the old bank was clearly entitled to the benefit of the tax saving made through the use of its property.

ARGUMENT

We respectfully submit that petitioner makes out no case for the granting of *certiorari* for the following reasons:

1. Certiorari Will Not Ordinarily Issue to Review an Interlocutory Order. There Has Been No Final Decision Below.

The opinion and judgment of the Court of Appeals entered no final order against the defendant bank. The Court of Appeals merely reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with the opinion of the Court. Thus there is no final decree in the case and the decision which this Court is asked to review is one directing the entry only of an interlocutory order.

We recognize that *certiorari* may be granted to review an interlocutory order. But the general rule is that the absence of finality is a circumstance which ordinarily will influence the court to refuse the writ. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 623.

> "Whether *certiorari* shall be granted to review a non-final judgment or decree of the Circuit Court of Appeals raises a question of propriety, not of power. Power exists in the Supreme Court to issue the writ whether the judgment or decree of the Circuit Court of Appeals is or is not a final disposition of the controversy. But the Court has repeatedly said (especially in its earlier decisions) that 'except in extraordinary cases, the writ is not issued until final decree,' and has warned that the

> circumstance that the decision of the Circuit Court of Appeals is not a final one is 'a fact that of itself alone furnished sufficient ground for the denial of the application.' It has pointed out that on *certiorari* to review a final decree of a Circuit Court of Appeals it can reach back to correct errors occurring in the interlocutory proceedings, and that neither the failure of parties to apply for *certiorari* to review an interlocutory ruling nor the denial by the Court of an application made at that stage affects the right to issue the writ to review the final decision of the court below, nor the scope of review on such writ."

This statement is fully supported by the cited cases. See *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916); *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408, 409 (1916); and *American Construction Company v. Jacksonville, etc., Railway Company*, 148 U. S. 372, 383, 384 (1893).

In the case last cited the Court said:

> "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

This language is directly applicable in the present situation where the case goes back for an entirely new trial.

2. *In an Equity Case Reversed Generally, The Circuit Court of Appeals Had Clear Power to Indicate Its Views Upon the Law of the Case Notwithstanding There Was No Cross-Appeal.*

The petition for *certiorari* relies chiefly on the contention that the Circuit Court of Appeals had no power to pass upon issues not raised by cross-appeal. Petitioner cites (p. 5 of its brief) cases holding that in the absence of cross-appeal an appellee has no right to be heard upon issues decided against him. But these cases are beside the point. The appellee here had no right to be heard upon matters with respect to which he had not filed a cross-appeal; but the absence of a cross-appeal did not at all affect the **power** of the appellate court, of its own motion, to deal with all the issues presented by the case, notwithstanding the fact that there was no cross-appeal raising some of such issues.

The argument for the petitioner ignores the distinction to be taken between (a) the **right** of an appellee to be heard without a cross-appeal and (b) the **power** of a court of equity, upon a general reversal, to indicate its views upon the law of the case, regardless of the fact that these views would result in the appellee's obtaining upon a retrial a recovery greater than that granted him by the District Court in a decree from which no cross-appeal was filed.

We, of course, concede that in the absence of a cross-appeal appellee has no **right** to claim relief beyond that awarded him by the lower court. This is the effect of the cases cited by the petitioner, but those cases do not touch the point here involved.

The distinction thus ignored by the petitioner has been emphasized by this Court. See *Langnes v. Green*, 282 U. S. 531, 538 (1931), where this Court, after reviewing

a number of the cases relied upon by the petitioner in this case, said at page 538:

> "These decisions simply announce a rule of practice which generally has been followed; but none of them deny the **power** of the court to review objections urged by respondent, although he has not applied for *certiorari*, if the court deems there is good reason to do so." (Emphasis by the Court.)

In *Irvine v. The Hesper*, 122 U. S. 256 (1886), this Court said:

> "We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

The same rule was applied in *Reid v. Fargo*, 241 U. S. 544 (1916), and in *The John Twohy*, 255 U. S. 77 (1921). See also *Standard Oil Co. of N. J. v. Southern Pacific et als*, 268 U. S. 146 (1925); *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, etc., 248 U. S. 9 (1918), where the Court said:

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. * * *"

The cases which we have just cited were all cases in admiralty; other admiralty cases applying the same rule in Courts of Appeal are *Munson S. S. Line v. Miramar*, 167 Fed. 960 (C.C.A. 2, 1909); *The Townsend*, 29 F (2d) 491 (C.C.A. 2, 1928); *The Canadia*, 241 Fed 233 (C.C.A 3, 1917). But courts of admiralty proceed upon equitable principles and according to the rules of natural justice,

and it would be anomalous to contend that principles of equal breadth should not apply in a proceeding in equity. Compare *The Virgin*, 8 Pet. 538, 549 (1834).

In *Langnes v. Green, supra*, 282 U. S. 531, 538, this Court's language unmistakably indicated its view that the broad power of an appellate court upon appeal was not limited to admiralty cases. This is apparent not only from the language of the court in the *Langnes* case, but from the fact that this language followed the citation of cases which did not arise in admiralty.

The broad scope of the rule is recognized in the practice of this Court. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, p. 803:

> "In the absence of a cross petition respondent is not entitled to be heard in opposition to the parts of the decision of the court below which were adverse to him, the general rule applied by the Supreme Court being that consideration of the case will be confined to an examination of errors asserted by petitioner where respondent has failed to present a cross petition for *certiorari*. The Court has stated, however, in a careful and well reasoned *dictum*, that these decisions simply announce a rule of practice which generally has been followed, without denying the *power* of the Court to review objections urged by respondent to the decree below, although he has not applied for *certiorari*, if the Court deems there is good reason to do so."
>
> Citing *Langnes v. Green*, 282 U. S. 531, 535-538; *Lutcher & Moore Lumber Company v. Knight*, 217 U. S. 257, 267; *Delk v. St. Louis & San Francisco R. Co.*, 220 U. S. 580; *Baker v. Warner*, 231 U. S. 588, 593; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 21, 39.

Before its decision in this case the Circuit Court of Appeals for the Fifth Circuit had recognized the broad effect of the language of this Court in the *Langnes* case.

See *Calhoun County, Fla. v. Roberts*, 137 F. (2d) 130 (1937). In that case, as in this one, the court asserted and exercised its **power** to direct a disposition of the case which had the effect of enlarging the rights of an appellee who had filed no cross-appeal, saying:

> "We acknowledge the general rule that a cross appeal or cross *certiorari* is necessary to enable an appellee or respondent in *certiorari* to ask the appellate court to reverse the part of a decree which is unfavorable to him. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 57 S. Ct. 325, 81 L. Ed. 593. The rule was applied even to an admiralty decree, the appeal from which is a *de novo* trial, in *The Maria Martin* (*Martin v. Northern Transportation Co.*), 12 Wall. 31, 20 L. Ed. 251. But in another case in admiralty, *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, by way of considered dictum, it was declared that the rule is one of the practice generally followed, limiting the rights of litigants, but not a restriction on the power of the appellate court to see that justice is done. We are reversing the conclusion of law of the district judge that the recourse is against the County and we esteem it necessary to justice to reopen his conclusion of law that there was no recourse against any bond proceeds in the balance of the Construction Fund. We act on our own motion, and not at the instance of appellee. We have disturbed no fact finding of the district court (as was done in the *Morley Construction Company* case), but differing only on the law, we propose to apply in all its consequences the law as we see it. We hold we have the power, without cross appeal, to do this."[9]

The Circuit Court of Appeals for the Fifth Circuit has repeatedly taken a similar position in other cases and its practice in this regard is well settled.

[9]Judge Waller concurred in this opinion. We are unable to reconcile his dissent on the procedural point in the present case with his concurrence in the cited case.

In *Weeks v. Pratt*, 43 F. (2d) 53 (1930), the Court said:

> "This is an appeal in equity. The whole case is before us and we may render such decree as may be just and proper in the premises."

In *Jones v. St. Paul Fire & Marine Co.*, 108 F. (2d) 123 (1940), the court said in speaking of the effect of a prior reversal:

> "It was in an equity case in which all the evidence theretofore taken stood good and only the judicial conclusion upon it was wiped out. The parties were free on such reversal to present by amendment new issues, if not inconsistent with what the appellate court had adjudged."

See also *Madden Furniture Co. v. Metropolitan Life Insurance Co.*, 127 F. (2d) 837 (1942); *Calhoun County, Fla., v. Roberts*, 137 F. (2d) 130 (1943) cited *supra*, p. 13, *Roth v. Hyer*, 142 F. (2d) 227 (1944); *Fleniken v. Great American Indemnity Co.*, 142 F. (2d) 938 (1944).

In the case last cited, the court maintained the right of an appellee to amend pleadings after the case had been remanded, saying:

> "The court could have made a final adjudication of the issue of liability on the record before it, and ordered that only the amount of damages be tried. It did not do that, but reversed and annulled the only judgment there was and ordered further consistent proceedings. The question is, what proceedings will be consistent? 'Generally, when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinion of the appellate court, which must be regarded as the law of the case on the second trial.' 3 Am. Jur., Appeal and Error, §1240."

The power of the court to decide issues not raised by an independent appeal was strikingly exercised by the Circuit Court of Appeals for the Second Circuit in a bankruptcy case. See *In re Barnett*, 124 F. (2d) 1005. In that case the court stated the applicable rule in the following language:

> "In declining to make a narrow disposition of this appeal, which will afford only inadequate relief to the parties and leave in effect a truncated order, we are in part guided by the fact that a court of bankruptcy is a court of equity,[10] and that once a court of equity has taken jurisdiction of a case, it will endeavor, in order to do justice, to dispose harmoniously of all its aspects. It is established doctrine, furthermore, that in disposing of a case before it, an appellate court has a broad power 'to make such disposition * * * as justice requires.' * * * " (124 F. (2d) at p. 1009).

The court then adverted to what has been termed the "sporting theory of justice" and indicated its dissent therefrom, saying:

> "But we think that courts, in civilized communities should do more than decide cases, one way or another, without regard to considerations of justice, merely to prevent private brawls and breaches of the peace. Government having, through its courts, established in large areas, a monopoly of dispute-deciding, should try, as far as possible, to decide cases correctly—both by ascertaining the actual facts, as near as may be, and then by applying correct legal rules in an effort to do justice to the parties affected by their decisions. And not merely the parties, but the public as well, are interested that justice shall be done. The Supreme

[10]That a bankruptcy court is a court of equity is not in doubt. See *Securities and Exchange Commission v. United States Realty & Improvement Company*, 310 U. S. 434 (1939). The same considerations that control the actions of a bankruptcy court are *a fortiori* applicable in a proceeding in equity.

> Court has said that 'a trial in court is never * * * purely a private controversy * * * of no importance to the public.' "[11] (124 F. (2d) p. 1010.)

As the Court of Appeals pointed out, in this case the new bank took a general appeal from the decree below. It did not appeal only from a part of the judgment as it might have done, FRCP Rule 73 (b). The reversal granted was a general reversal. Upon such a reversal the case is to be tried *de novo* and is in the same position in the lower court as if no decree had been entered there. This would be true even in an action at law; it is even more obviously true in a proceeding in equity. See *Illinois Power & Light Corp. v. Hurley*, 49 F. (2d) 681 (C.C.A. 8, 1931); *Hawkins v. Cleveland*, 99 Fed. 322, 324 (C.C.A. 7, 1900); *Newcomb v. Burbank*, 182 Fed. 954 (C.C., N.Y., 1910); *Central Improvement Co. v. Cambria Steel Co.*, 201 (Fed.) 811, 818 (C.C.A. 8, 1912); *Duke Power Co. v. Greenwood*, 91 F. (2d) 665 (C.C.A. 4, 1937). In the case last cited the court, through Judge Parker, said:

> "The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. * * * "

This Court has itself also recognized that an appeal in equity is a proceeding in continuation of the original suit; see *MacKenzie v. A. Englehard & Sons Co.*, 266 U. S. 131, 142 (1924); compare *Keller et als. v. Potomac Electric Power Co.*, 261 U. S. 428, 443 (1923).

In the light of the foregoing authorities, there can be no question as to the power which the District Court had,

[11] Citing *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318 (1929).

upon a general reversal and remand of the case, to try the case *de novo* and to permit amendments to pleadings and the assertion of new claims. What logical ground could then be assigned for denying to the Court of Appeals the right to indicate the principles which in its opinion should control the District Court upon a trial *de novo?*

When the new bank took a general appeal from the judgment of the lower court and thus applied for a reversal, it took its chances that upon a reversal the case might be tried again and that the result upon the new trial might be less favorable to it than upon the original trial. This is the sort of risk incident to many decisions in a lawsuit at various stages. Whenever a defendant against whom a judgment of some sort has gone applies for a new trial, he takes the risk that when the new trial is granted, the result upon retrial might be less favorable than the result of the original trial. Similarly, when a plaintiff who has gotten a judgment for less than he has demanded takes an appeal, he also takes the risk that upon a reversal and a new trial, he may fare less well than he did originally. When the new bank took its appeal in this case and asked for a general reversal, it took the same sort of risk.

There is no force in the contention that the petitioner had no opportunity to be heard upon the issues dealt with in the opinion of the Court of Appeals. After the original opinion was handed down by the Court of Appeals, the petitioner filed a vigorous brief asserting all of its objections to the findings of the Court of Appeals. That this brief received the careful and detailed attention of the Court of Appeals will appear from the most casual reading of the opinion written by the Court of Appeals upon the application for a rehearing. (R. 822-831).

3. *A Court May, and Indeed Should, Disregard Admissions of Counsel on Questions of Law Where Such Admissions Are Deemed Erroneous.*

Petitioner assigns as a ground for the granting of *certiorari* that the opinion of the Court of Appeals gives the old bank relief beyond that for which the Receiver's counsel had argued in the lower courts, although not beyond the issues made by the pleadings.

It is true that when the case was called for argument in the lower court, counsel for the Receiver stated to the court that while of the opinion that the charges made by the new bank were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. This statement (which does not appear in the record, having been made informally and *arguendo*),[12] was repeated in the appellee's brief in the Circuit Court of Appeals.

It now appears that counsel for the Receiver underrated the power of a court of equity to give the old bank relief against the excessive and unjust claims of the new bank, which stood in a trust relation.[13] Is this circumstance any reason for denying to the Receiver the relief to which he would otherwise be entitled? Counsel have cited no authority in support of their contention to that effect, and we do not believe that any such authority can be found. It has been repeatedly held that courts are not bound by stipulations of counsel upon questions of law.

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[12]The District Judge in his opinion did not discuss the plea of usury, but he referred to the "harsh nature" of the contract and to the fact that the plaintiff had sought "the application of such equitable considerations as the circumstances demand." (R. 694.)

[13]This would not be the first time that the authors of this brief have been wrong in forming an opinion on a question of law. Perhaps this observation may be true also of other counsel and even of courts. Our paramount concern is, of course, to discharge fully and properly our professional obligation to the Court and to our client.

See *Swift & Co. v. Hocking Valley R. R. Co.*, 243 U. S. 281, 287 (1917):

> "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.
>
> * * * * *
>
> " 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty, of the court in this regard.' *California v. San Pablo & Tulare R. R. Co.* 149 U. S. 308, 314. See *Mills v. Green*, 159 U. S. 651, 654. The fact that effect was given to the stipulation by the appellate courts of Ohio does not conclude this court. See *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 410. We treat the stipulation, therefore, as a nullity."

The same rule was applied in *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939). Numerous decisions of the lower federal courts are to the same effect.

As Judge Holmes remarked in his opinion for the Court of Appeals: "Court sit to do justice between the parties, not merely to decide points in a tilt between lawers."[14]

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[14]This language may be compared with the following language of the Court of Appeals for the Second Circuit in *In Re Barnett*, 124 F. (2d) 1005, 1010:

"But while a court must often rely chiefly on the arguments of opposing counsel, and while, as a consequence, inadequate arguments may sometimes lead courts to overlook points which counsel have not pressed (so that, indeed the decision may have little value as a precedent), the occasional resulting incompleteness or errors in a decision should not be cherished as a virtue. A court striving to do justice between the parties, should not put on blinders and ignore matters which counsel overlook. We do not, however, mean to suggest that there are no limits to the extent to which a court may relieve a party from the procedural mistakes of his lawyer; thus, for instance, we would be powerless here if no party had appealed." (P. 1011.)

Even if the Receiver could be bound on a question of law by the erroneous admissions of counsel, the stockholders of the old bank, who intervened in this case, could not be. Certain stockholders of the old bank filed a petition of intervention in the case and joined in the demand for an accounting and in the complaint made by the Receiver against the excessive charges of the new bank (R. 42). The new bank moved to strike this intervention (R. 48), but the motion was overruled by the District Judge (R. 76) and a petition for mandamus was denied by the Court of Appeals. The intervenors remain in the case. They could not in any event be bound by an admission made by counsel for the Receiver.

4. *The Opinion of the Court of Appeals is Not, on The Special Facts of This Case, Contrary to Any Local Law, Statute or Decision.*

Petitioner contends that the opinion of the Court of Appeals rested solely upon the conclusion that the charges made by the new bank were void for usury, and that such a conclusion is contrary to applicable local law.[15]

No Louisiana case has been cited with facts even remotely resembling the facts of the present case. Petitioner's brief (pages 21, 22) relies solely upon two Louisiana cases in which it was held that it was not usurious to purchase or acquire promissory notes at a discount in view of the provisions of Article 2924 of the Civil Code of Louisiana. On their facts these cases are obviously different from the present case, and they afford no support for the contention that the opinion of the Court of Appeals is inconsistent with decisions of the State courts.

The Court of Appeals put its conclusion upon broad equitable grounds, saying (R. 826):

[15]Usury was specially made an issue in the case by the allegations of the Receiver's supplemental and amended petition (R. 45-47).

> "The modern meaning of the word usury implies that some interest was due for the use of money and that an excessive amount was charged or collected. If interest was charged by appellant for the use of money when no money was advanced or owing, then there was a total failure of consideration and such amount should be disallowed. No interest can accrue if no principal is owing. Therefore, we would not say that the interest charged on the million-dollar note was usurious, because that would imply that some interest was due, when the fact is that there was only a potential liability on this note and not one cent of principal or interest was ever actually due or owing thereon."

Article 21 of the Civil Code of Louisiana contains a broad declaration of the applicability of principles of equity:

> "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Compare *Jackson v. Ludeling*, 21 Wall. 616 (1874); *Michoud v. Girod*, 4 How. 503 (1845).

That the opinion of the Court of Appeals was not rested solely upon the ground of usury, is apparent from the following language used by the Court in its original opinion (R. 791, 792):

> "If the provision were not usurious in attempting to authorize the exaction of interest on assets, it should not be enforced in a court of equity for the following reasons:
>
> "Where the directors of a failing bank form a new bank and in effect pledge to themselves every asset of the old bank, a court of equity should scrutinize the contract with great care and strike down every oppressive and overreaching provision.

> This is true even though the stockholders ratified the contract because the parties were not on an equal footing and the directors occupied a position of trust and confidence. The old shareholders were given the option to take stock in the new bank; but for many of them doubtless this was impossible, as very few availed themselves of the option. The contract should have been drawn so as to treat both groups fairly. The directors had the advantage of an intimate knowledge of the old bank's condition, which the ordinary stockholders did not have. A hard bargain driven by fiduciaries in such circumstances is presumed to be fraudulent and void. 25 C. J. 1118, 1119, 1120. The law of fiduciaries would be futile if it lacked the capacity to correct abuses arising out of the relation of trust and confidence existing between the directors of a corporation and its stockholders."

In using this language the Court of Appeals had in mind the proven facts: that the contract between the old bank and the new bank was drawn by an individual who had been vice-president of the old bank and became executive vice-president of the new bank; that the new bank was organized by a group of individuals comprising chiefly the larger stockholders and officers of the old bank; and that most of the capital of the new bank was obtained by a loan from the old bank on the last day that bank was open so little that new cash was provided.[16]

The Court of Appeals also referred to the evidence in the record tending to support an inference that the new bank was not entitled to compensation because of its exorbitant charges, its management of the assets so as to bring about the appointment of a receiver and its effort to buy the trust estate at a price that would cause great loss to the stockholders of the old bank (R. 824, referring to the letter to the Comptroller at R. 470). Under the

[16] See the findings of fact in the opinion of the District Court, R 689-694.

mandate of the Court of Appeals, these matters are left open for further inquiry upon a new trial in the court below.

That the opinion of the Court of Appeals was based upon the inferences which it drew from the record as to the inequity of the claims of the old bank is further shown by its citation of the recent decisions of this Court denying compensation to receivers and others occupying positions of trust whose conduct was found inconsistent with the high standards demanded of fiduciaries. See *Crites, Inc., v. Prudential Inc. Co.*, 322 U. S. 408 (1944); *Woods v. City Bank Co.*, 312 U. S. 262, 268 (1941); *Weil v. Neary*, 278 U. S. 160, 173 (1928), all cited at R. 830, 831. By its citation of these cases, the Court of Appeals further indicated that this case turned upon its special facts and upon fundamental principles of equity and fair dealing.

5. *There Is No Conflict Between the Decision in This Case and the Decisions in Other Circuit Courts of Appeals.*

Petitioner claims that the decision below is in conflict with the decisions of the First Circuit in *Trustees of Somerset Academy v. Picher*, 90 F. (2d) 741 (1937), and of the Fourth Circuit in *Aberly v. Craven County*, 70 F. (2d) 52 (1934). Even a casual reading of the cited cases will show the dissimilarity between their facts and the facts of the present case, and the entire absence from them of the special circumstances which led to the decision of the Court of Appeals in the instant case.

It is true that in both of the cited cases a note was given by an old bank to a new bank to represent the deficiency between the assets of the old bank and its liabilities, which were assumed by the new bank. **But in both of these cases there was a real and actual de-**

ficiency. In the present case there was no deficiency.[17] Even after making charges against the old bank aggregating $1,311,346.64, the new bank had in its hands, at the time of the rendition of the decree in the District Court, assets of the old bank in excess of all liabilities and claims amounting to $274,707.83 (R. 759).[18]

Moreover, in the cited cases, there was no provision that the new bank should be entitled to charge interest at the rate of 6% per annum upon the assets of the old bank. It is against this charge particularly that the Court of Appeal held the old bank entitled to be protected. No such charge was even attempted by the new bank in either of the cited cases, and there is nothing in the opinion in either of them which is in any way opposed to the opinion of the Court of Appeals in this case, or which is even relevant to any of the issues upon which that opinion was based.[19]

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[17]In the footnote at page 25 of its brief, the petitioner claims that the Comptroller of the Currency recognized that the $1,000,000 note in this case represented a real obligation, referring to the Comptroller's letter of instruction to the Receiver. (R. 531.) That letter was written on January 23, 1941, almost two years after the filing of the present suit and at a time when all the circumstances of the dealings between the parties were about to be brought before the court. Obviously, the Comptroller did not undertake to say that the note represented any actual deficiency because it is necessarily admitted, even by the new bank, that there was no such deficiency. At the time the letter was written, the note had been placed in Class A assets, which merely had the effect of reducing the amount of assets in Class B (since the aggregate of Class A and Class B assets was to represent liabilities of the old bank). The Comptroller's letter was intended solely to require proper security for the admitted surplus in the liquidation account.

[18]In addition to the amount on hand in cash, there was also on hand at the time of the final decree some assets of the old bank which had not yet been realized upon and the proceeds of which will add to the surplus of the old bank's assets over its liabilities.

[19]In its brief in the Court of Appeals, the petitioner claimed that the decision in this case was opposed to the decision in *Hightower v. American National Bank*, 254 Fed. 249, 276 Fed. 371, 263 U. S. 351. This contention now appears to be abandoned. Reference to the opinion in the *Hightower* case will show that in that case the new bank made no attempt to make such a charge as is sought to be made in this case. In the *Hightower* case there was an actual deficiency and the new bank actually paid out its own funds to meet such deficiency, seeking only reimbursement for amounts so paid out with interest thereon. See the discussion of the *Hightower* case and of *Richter v. Laredo National Bank*, 62 F. (2d) 289 (C.C.A. 5) in the opinion of the Court of Appeals in this case (R. 827, 829, 830).

6. *There Was No Error in the Decision Upon the Tax Point; the Old Bank Was Clearly Entitled to the Benefit of the Tax Saving Made Through the Use of Its Property.*

The new bank claimed the right to make a profit of $191,778.55 through its administration of the affairs of the old bank by effecting a saving of that amount in taxes upon its shares of stock through the use of the old bank's real estate. This saving resulted from the fact that under the Louisiana taxing system (which is similar to that of other States) in the taxation of shares of stock in a bank, a deduction may be taken in the valuation for assessment purposes for the value of real estate owned by the bank. The new bank used the old bank's real estate to obtain a credit on the taxes against its shares of stock.[20]

There can be no argument that the new bank stood in the position of a pledgee. Arts. 3168 and 3176 of the Louisiana Civil Code contain a statutory recognition of the rule that the pledgee must account to the pledgor for the fruits of the pledge. In its brief in this court petitioner argues that the word "fruits" is not broad enough to cover the present situation. The lack of basis for this contention is shown by the comment of an authoritative writer on the Louisiana civil law of Pledge. See Denis on Contracts of Pledge, Sections 205, 206, where the author states that the pledgee

> "has no right to use the article pledged for his own pleasure or benefit without the consent of the pledgor",

[20]The new bank actually charged the old bank the taxes paid on the real estate in an aggregate of $161,642.78 (R. 354). This charge stands on the final accounting but is offset and extinguished by the credit which the lower courts decreed the old bank must receive for the new bank's saving of $191,778.55.

and cites also with approval the language of a French commentator to the effect that:

"the pledgee can neither make use of the thing pledged nor have the enjoyment of it nor receive any profit from it without the consent, express or tacit, of the pledgor."

The principles stated are of general application under every system of law. See Restatement of the Law of Security, comment to Section 22; Restatement of Restitution, Article 1, page 12.

A pledgee stands in the position of a trustee as to the use of the pledged property. It is settled in the law of trusts that:

> "the trustee is accountable for any profit made by him through or arising out of the administration of the trust although the profit does not result from a breach of trust."

See Restatement of Trusts, Section 203. Comment b on this Section contains the following illustration:

> "Thus if the trustee receives payment for the use of the trust property, he is accountable for the money received. * * * "

The new bank's attempt to enrich itself by the tax saving is particularly reprehensible in view of the repeated statements of officers of the new bank in letters to the Comptroller of the Currency that:

> **"It is not now and has never been our purpose to make a profit on the transaction; in fact, as between a profit and a nominal loss we would prefer the latter."** (R. 472, 108, 469).[21]

[21]These repeated protestations were, of course, only consistent with the express language of the contract which provided that the new bank was to be entitled only to *indemnify* itself for liabilities assumed, actual expenses and a reasonable fee. (R. 19.)

In the lower courts the new bank sought to retain the benefit of the tax saving by contending that the saving benefited its shareholders, not itself.[22] This highly technical position properly received no recognition in this case from either of the lower courts. While the taxes are assessed against the bank shares, they are required by law to be paid by the bank itself, and were so paid in this case. The Louisiana taxing statute provides that all taxes assessed against the shares of stock of a bank must be paid by the bank **directly** and the bank "shall be entitled to collect the amount thus paid from the shareholders or their transferees". See Dart's Louisiana General Statutes, Section 685, reprinted in the appendix. In practice, as in the instant case, the result is the same as if the tax were laid directly upon the corporation.

While under the law the bank has the right to claim reimbursement from stockholders, in practice no bank does so, and the new bank in this case did not do so. Obviously, it would be meaningless for a bank to collect sums from its stockholders, as to do so would merely add to its undivided profits, which would then be distributed back to its stockholders as dividends. On its own books, in the ordinary case, a bank will charge all the taxes paid by it as an expense of operation before it calculates its profits for dividends. The stockholders pay the tax ultimately by having their dividends reduced by the amount of taxes so paid just as every stockholder in a substantial sense ultimately bears the burden of a tax assessed against his corporation; but no bank ever actually collects from

[22]There were only 15 stockholders in the new bank when it was organized (R. 358, 537.) Three of these owned $445,000 of its stock, or almost half of its capital.

its stockholders the taxes theoretically laid upon its shares.[23]

This Court has recognized that the ultimate incidence of the tax is the same as if it were laid upon the bank; see *Bank of California v. Richardson*, 248 U. S. 476, 485 (1918), where the Court said:

> "It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. **But it is also undoubted** that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of **ultimate beneficial interest,** treated the stock interest, that is, the **stockholders, and the bank as one and subject to one taxation** by the methods which it provided."

See also *Schuylkill Trust Company v. Pennsylvania*, 296 U. S. 113 (1935); s. c., 302 U. S. 506, 514 (1938); compare *Commercial Bank v. Chambers*, 182 U. S. 556 (1901); *New Orleans v. Houston*, 119 U. S. 265 (1886).

The refuge which the new bank seeks to take in the corporate fiction fails also because that fiction will be disregarded wherever necessary to prevent fraud or oppression. See Fletcher's Cyclopedia of Corporations, Volume 1, pages 139, 165; 13 American Jurisprudence, section 70, page 160; *Anderson v Abbott*, 321 U. S. 348 (1944); *Pepper v. Litton*, 308 U. S. 295, 311 (1939).

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[23]That, realistically, the taxes are paid by the bank itself, and not by its shareholders, is illustrated by the provisions of Internal Revenue Code, Section 23 (d), by virtue of which a bank is entitled to take a deduction in its income tax return for taxes paid upon its shares of stock.

But even if the new bank's stockholders could be considered third persons, the new bank as trustee could not use the trust property for their advantage. See Restatement of Agency, Section 404; Restatement of Trusts, Sections 203, 206 (j).

In the Restatement of Agency, Section 404, it is said:

> "An agent, who in violation of duty to his principal, uses for his own purposes or those **of a third person** assets of the principal's business is subject to liability to the principal for the value of the use."

If the agent diverts the property of his principal to the benefit of a third person, the agent is responsible to his principal, just as much as if he diverted it to his own benefit. On the defendant's own argument, the property of the old bank has been used by the new bank (which was a fiduciary for the old bank) to save taxes for the new bank's stockholders. For such use the new bank is liable to the old bank.

Finally, if there were any substance in the argument that the new bank's stockholders were different from the bank itself the new bank might have recovered from its stockholders in this very suit the $191,778.55 of taxes which those stockholders would have had to pay if the plaintiff's assets had not been used to relieve them of the payment. See FRCP Rule 14 (a). The defendant, if it had wished to do so, might have asked the Court to implead its stockholders in this case in order that it might have judgment against them for the amount of the taxes which they should have paid. Surely, the new bank cannot be permitted itself to elect whether it will recoup itself from its stockholders or not. Surely, the new bank, occupying the position of a trustee, cannot be permitted by its own election to deprive its beneficiary of the benefit of a tax

saving through the use of the beneficiary's property, and give that benefit to its stockholders. Surely, the defendant under these circumstances can no more claim the benefit of the tax saving for its stockholders than it can for itself.

For all of the foregoing reasons, we submit that the application for *certiorari* should be denied.

Respectfully submitted,

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